

STATE OF MICHIGAN
IN THE SUPREME COURT

* * *

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellant,

-v-

BRANDON MICHAEL HALL,

Defendant/Appellee.

Supreme Court
Docket No. 150677

Court of Appeals
Docket No. 321045

Ottawa County Circuit Court
Case No. 13-037857-AR

58th District Court
Case No. GH-13-32796-FY

DEFENDANT/APPELLEE'S BRIEF IN OPPOSITION
TO ATTORNEY GENERAL'S LEAVE TO APPEAL

Donald H. Hann (P 14608)
HANN PERSINGER, P.C.
Attorneys for Defendant/Appellee
503 Century Lane, P.O. Box 1559
Holland, Michigan 49422-1559
(616) 396-1245

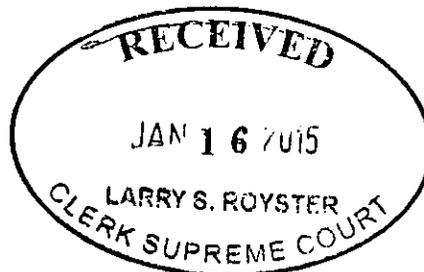
Bill Schuette
Attorney General

Aaron D. Lindstrom (P 72916)
Solicitor General
Counsel of Record

Matthew Schneider (P 62190)
Chief Legal Counsel

Richard L. Cunningham (P 29735)
Assistant Attorney General

Attorneys for Plaintiff/Appellant
Criminal Division
3030 West Grand Blvd., Suite 10-200
Detroit, Michigan 48202
(313) 456-0180



Dated: January 15, 2015

TABLE OF CONTENTS

I.	JUDGMENT APPEALED	2
II.	STATEMENT OF QUESTIONS PRESENTED	3
III.	QUESTIONS PRESENTED	4
III.	CONCISE STATEMENT OF PROCEEDINGS AND FACTS	5
	A. Stipulated Statement of Facts	
	B. District Court Opinion and Order	
	C. Circuit Court Oral Argument (Opinion)	
	D. Court of Appeals' Opinion	
IV.	INDEX OF AUTHORITIES	6
V.	ARGUMENT	7
	I. STATUTORY CONSTRUCTION	7
	II. RULE OF LENITY	9
	III. DUE PROCESS	9
VI.	RELIEF REQUESTED	11

JUDGMENT APPEALED

The Attorney General is seeking leave to appeal from the Court of Appeals' opinion affirming the 20th Circuit Court's opinion affirming the opinion of the 58th District Court holding this case must proceed as a misdemeanor and not a felony.

STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals err in concluding that the prosecution must charge the more specific misdemeanor offense even though MCL 168.937 and MCL 168.544c address different conduct and require proof of different elements?

Plaintiff/Appellant answers:	Yes
Defendant/Appellee answers:	No
District Court answers:	No
Circuit Court answers:	No
Court of Appeals answers:	No

2. Did the Court of Appeals err in concluding that the "Rule of Lenity" operates in favor of the accused in this case?

Plaintiff/Appellant answers:	Yes
Defendant/Appellee answers:	No
District Court answers:	No
Circuit Court answers:	No
Court of Appeals answers:	No

3. Did the Court of Appeals err in concluding that the prosecution of the defendant for a felony under MCL 168.937 would violate his right to fundamental fairness?

Plaintiff/Appellant answers:	Yes
Defendant/Appellee answers:	No
Circuit Court answers:	No
Court of Appeals answers:	No

QUESTIONS PRESENTED

In the Michigan Election Law, MCL 168, *et seq*, the Legislature has made it a crime to sign someone else's name to a nominating petition. They have also made it a crime to sign as a circulator a petition the person knows is not accurate.

Penalties for these actions are set forth in two sections in MCL 168.937, Forgery; penalty makes it a five year felony, unless otherwise provided. MCL 165.554c, Nominating petition, makes the acts of the defendant misdemeanors.

The facts are not in dispute and the case has proceeded on stipulated facts.

It is the position of the Attorney General's Office that it has discretion to charge under either act. It is the position of the defendant that Section 554c requires the crimes to be charged as misdemeanors. The defendant argues that applying the rules of statutory interpretation require the charge be a misdemeanor.

The defendant also believes that to charge felonies in this case would be a violation of due process because the statutorily mandate warnings printed on the nominating petitions inform the violator that his acts would be misdemeanors.

The Legislature has clearly said that these acts are misdemeanors but the Attorney General is arguing that despite that determination he should have the right to charge as he wishes.

The District Court, the Circuit Court and the Court of Appeals have all rejected the Attorney General's opinion. The applicable law supports this position.

Material injustice will not occur if leave to appeal is denied and the integrity of the election process will not be threatened.

CONCISE STATEMENT OF PROCEEDINGS AND FACTS

The State filed two counts of Election Law Forgery, MCL 168.937, against the defendant in the 58th District Court. The defense argued the alleged acts can only be charged as misdemeanors under MCL 168.937.

The defense also argued that to allow prosecution as a felony would be a violation of due process of law.

The District Court ruled that the cases must proceed as misdemeanors but did not rule on the due process question. The Attorney General appealed to the 20th Circuit Court. The case was submitted on Stipulated Facts, a copy of which is attached as Exhibit A.

The Circuit Court affirmed the District Court's holdings, Exhibit B, and, in addition, agreed with the defense on the due process question. The Attorney General appealed by leave to the Court of Appeals. A copy of the Circuit Court judge's oral opinion is attached as Exhibit C.

The Court of Appeals affirmed the Circuit Court's decision. A copy of the Court of Appeals' opinion is attached as Exhibit D.

INDEX OF AUTHORITIES

Case Law

<i>Bukowski v City of Detroit</i> , 478 Mich 269 (2007)	8
<i>Connally v General Const. Co.</i> , 269 US 385, 391; 46 S Ct 126, 70 L Ed 322 (1926)	10
<i>First Bank of Cadillac v Miller</i> , 131 Mich App 764 (1984)	8
<i>Mittler Walloon, LLC v Melrose</i> , 281 Mich App 104 (2008)	10
<i>People v Buehler</i> , 477 Mich 18 (2007)	7
<i>People v Carter</i> , 106 Mich App 765 (1981)	7
<i>People v Denio</i> , 454 Mich 691 (1997)	9
<i>People v Jahner</i> , 433 Mich 490 (1989)	9
<i>People v LaRose</i> , 87 Mich App 298, 274 NW2d 45 (1978)	7,8
<i>People v Shaw</i> , 27 Mich App 325, 193 NW2d 700 (1978)	7,8
<i>U.S. v Sullivan</i> , 332 US 689; 68 S Ct 331, 29 L Ed 297 (1927)	10

Michigan Statutes

MCL 168.1	8
MCL 168.484	8
MCL 168.544	7,8
MCL 168.544(a)	9
MCL 168.544(c)	3,4,7,8,9
MCL 168.544(c)(7)	8,10
MCL 168.544(c)(8)	8,10
MCL 168.937	3,4,5,7,8,9,11
MCL 257.601b	11
MCL 750.316; 317; 319; 320; 321	11

U.S. Constitution Amendment V	9,10
U.S. Constitution Amendment XIV	10

ARGUMENT

I. **MCL 168.544 AND MCL 168.544(c) ARE THE EXCLUSIVE PENALTIES FOR VIOLATIONS SET FORTH IN THE STIPULATED FACTS.**

The Appellee is charged with multiple counts of forgery under MCL 168.937. The statute says that forgery under this Act is a felony unless otherwise provided. In 1965, the Legislature provided otherwise. It enacted MCL. 168.544(c) which says in §7 that an individual shall not do any of the following:

- a) sign a petition with a name other than his own.
- b) make a false statement in a certificate or a petition.
- c) if not a circulator, sign a petition as a circulator.
- d) sign a name as a circulator other than his or her own.

§8 says a person who violates §7 is guilty of a misdemeanor. That is what the Appellee did. It provides for a punishment of fines of not more than \$500.00 or imprisonment for not more than 93 days or both.

The entire argument of the Attorney General relies on the Court ignoring the words "otherwise provided" included in MCL 168.937. The forgery statute itself provides for misdemeanor treatment for the acts committed by the defendant.

The purpose of signing a name not your own is to lead someone to believe the signature is legitimate and act upon it. The act of signing someone else's name to a nominating petition prohibited in 544c is forgery under the common law. It is provided that such an act is a misdemeanor in the election law.

When two subjects encompass the same subject matter, one being specific and the other general, the specific statute controls. *People v Shaw*, 27 Mich App 325, 183 NW2d 700 (1978).

People v Buehler, 477 Mich 18, 26; 727 NW2d 127 (2007), provides that when there is a conflict between statutes that are read together, the more recent specific statute controls.

People v Carter, 106 Mich App 765, 869; 309 NW2d 33 (1981), states that where the Legislature carves out an exception to the general statute and provides a lesser penalty, the prosecutor must charge the statute providing the lesser penalty.

In *People v LaRose*, 87 Mich App 298, 274 NW2d 45 (1978), the court held that where the Legislature enacts legislation that is specific and carries a lesser penalty than the general statute, the specific legislation controls. Leave to appeal was denied May 2, 1979.

The Appellant does not mention MCL 168.544(c)(7) or (8) or why they do not apply. Neither does the Appellant try to distinguish *Shaw* or *LaRose*.

The Legislature specifically "otherwise provided" a punishment for forgery in the context of nominating petitions and specifically made it a misdemeanor.

In *First Bank of Cadillac v Miller*, 131 Mich App 764 (1984), the Court of Appeals held that when specific provisions conflict with general provisions, the specific will prevail, especially when the specific was enacted after the general, as in this case.

The Appellant argues that MCL 168.937 applies. We argue that MCL 168.544(c) applies. Both statutes are included in Section 168, *et seq*, titled "Michigan Election Law", MCL 168.1. The Legislature is presumed to know the content of the laws they enact. When MCL 168.937 was enacted, they made provisions that the felony punishment might not apply if they made the other provisions. "Otherwise provided" would be surplusage if that was not the case. Statutes are to be interpreted so that there is no surplusage, *Bukowski v City of Detroit*, 478 Mich 268 (2007).

An analysis of legislative history shows the Legislature determined that signing a false name to a petition is a misdemeanor. Judge Knoll, in his Opinion, did such research.

The Michigan Election Law as enacted in 1956 read, in part, as follows:

168.544. Same, size type, form circulators, designation, affidavit, unlawful signing, penalties. "...Any person who knowingly signs more than 1 petition for the same office, except where more than 1 candidate is to be nominated, or signs any name other than his own, shall be guilty of a misdemeanor. Any person who shall affix his signature to a petition as a circulator thereof, knowing that he is not a qualified and registered voter or knowing that any signature to the petition is not the genuine signature of the person purporting to sign the same shall be guilty of a misdemeanor. Any person who shall falsely swear to an affidavit attached to any such petition shall be guilty of perjury."

The conduct of the Appellee was considered a misdemeanor over 50 years ago. The Appellee did not sign any affidavit attached to any petition. He signed a certificate that is part of the petition that warned him any false statement would be a misdemeanor.

Another section of the 1956 law, MCL 168.484, provided that signing a fictitious or forged name to any initiative or referendum petition or to any ballot proposal amending the Constitution of the State of Michigan would be guilty of a misdemeanor.

The Appellant stresses the need for fair elections. The interest in fair elections should apply to the above petitions as well as the nominating petitions.

The above cited acts were replaced by PA 1965, No. 312, MCL 168.544(a) and 544(c). The new section eliminated the perjury provision contained in the old §544 and made all conduct in violation of the new 544(c) a misdemeanor.

II. THE RULE OF LENITY APPLIES.

The District Judge cited the Rule of Lenity. This rule operates in favor of the accused and mitigates punishment when punishment is unclear. *People v Jahner*, 433 Mich 490 (1989).

The Appellant cites *People v Denio*, 454 Mich 691 (1997). They claim that case says the Rule of Lenity applies only if the statute is ambiguous or "in absence of any firm legislative intent". However, the *Denio* court says that a statute can be "rendered ambiguous by its interaction with and its relation to other statutes", citing *People v Jahner*, *id*. That is the situation in this matter.

There is one section of the election law saying that the acts done by the Appellee constitutes a felony unless otherwise provided. Another section says the same acts constitute a misdemeanor. If the Appellant claims that the specific statute does not fit the "otherwise provided" language of the general forgery statute, then it is indeed ambiguous as to which should apply and the Rule of Lenity should be invoked.

The Appellant says that a statute controlling elections should be interpreted to accomplish the main purpose of obtaining a fair election and an honest return. Whether or not the punishment is a felony or misdemeanor is immaterial to a fair election. The signatures were disqualified and the candidate was denied a place on the ballot.

If the candidate had a sufficient number of signatures after disqualifying the invalid ones, he or she would still be placed on the ballot. The protection for a fair election is found in invalidating the signatures, not the punishment of a person submitting invalid signatures.

III. A CONVICTION UNDER THE FELONY FORGERY CLAUSE, MCL 168.937, CONSTITUTES A VIOLATION OF THE DUE PROCESS CLAUSE.

The state, in both the general Michigan Election Law and on the mandated nominating petitions, says that doing the acts that the Appellee did is a misdemeanor.

Amendment V to the United States Constitution requires due process of law. In his Opinion, Circuit Judge Van Allsburg also found that telling a person the specific act he did is a misdemeanor and then charging a felony is a violation of the due process clause.

Appellee could find no case directly on point but an examination of U.S. Supreme Court cases shows the philosophy applied by that Court. Fifth Amendment rulings of the U.S. Supreme Court bind the states through the Fourteenth Amendment.

Criminal statutes must be so precise and unambiguous that the ordinary person would know what is lawful conduct. *U.S. v Sullivan*, 332 US 689; 68 S Ct 331, 92 L Ed 297 (1997).

A statute which either forbids or requires the doing of an act in terms so vague that men of ordinary intelligence must necessarily guess at its meaning and differ to its application violates the first essential of due process of law. *Connally v General Const. Co.*, 269 US 385, 391; 46 S Ct 126, 70 L Ed 322 (1926).

In this case, the Appellee would know what conduct to avoid but was told by the petition that he would be guilty of a misdemeanor.

The Appellant points out that misdemeanor statement is contained in the warning about circulators. There is a separate statement that a person who signs a name other than his own is violating the Michigan Election Law.

The Michigan Election Law contains both the felony and misdemeanor statutes. A person who reads the specific conduct prohibited in MCL 168.544(c)(7) and reads §544(c)(8) would be told that he would be guilty of a misdemeanor. If another person read the forgery provision and ignored the "otherwise provided" section, he would argue that it was a felony. A person would have to guess which one applied. This is a violation of due process.

Procedural due process, as the Appellant says, serves as a limitation on government action that might result in a deprivation of life, liberty or property. *Mittler Walloon, LLC v Melrose*, 281 Mich App 104 (2008).

The difference between the penalties is significant. A possibility of 5 years incarceration as opposed to 93 days and a fine not exceeding \$1,000 per count as opposed to \$500 per count.

Appellee believes that if the Court ignores the "otherwise provided" language in the forgery statute the ambiguity and having to guess as to what the penalty would be constitutes a violation of due process.

The Attorney General argues that applying the "due process" clause to the written warning could let a murderer of a construction worker within a work zone limit his/her punishment to 15 years.

Murder requires the intent to kill. The provision about killing a construction worker in MCL 257.601b applies to negligent or reckless acts as well as intentional acts. The statute does not delineate that certain acts would carry a lesser punishment nor do the warnings at the work site.

MCL 168.937, Forgery, provides a maximum five year penalty unless "otherwise provided". "Otherwise provided" is not present in MCL 257.601b or in the homicide statute, MCL 750.316; 317; 319; 320 and 321.

The Attorney General wants the Court to totally disregard the phrase "otherwise provided". That phrase is not a typographical error or an accident. It was inserted in the original act and has been retained in subsequent acts.

RELIEF REQUESTED

Appellee respectfully requests that the District Judge's, the Circuit Judge's, and the Court of Appeals' opinions be affirmed and leave to appeal be denied.

Respectfully Submitted:



Donald H. Hann (P 14608)
HANN PERSINGER, P.C.
Attorneys for Defendant/Appellee
503 Century Lane, P.O. Box 1559
Holland, Michigan 49422-1559
(616) 396-1245

Dated: January 14, 2015

EXHIBIT

A

BRANDON HALL

STIPULATED STATEMENT OF FACTS

1. Mr. Chris Houghtaling ran in the 2012 election for 58th Judicial District Court race.
2. Mr. Houghtaling obtained the services of Defendant Brandon Hall to obtain the necessary signatures on the nominating petitions.
3. The deadline to have the necessary 1,000 signatures on the nominating petitions filed in Lansing was May 1, 2012.
4. On the evening of April 30, 2012 there were insufficient signatures necessary to be filed.
5. On the evening of April 30, 2012 Defendant Brandon Hall went over to the home of Zachary Savage.
6. Defendant Brandon Hall brought with him blank nominating petitions and the Defendant Brandon Hall and Zachary Savage worked all night writing names and addresses of individual on the nominating petitions and signing their signatures to the petitions.
7. Defendant Brandon Hall wrote the names using both his right and left hand.
8. Defendant Brandon Hall would use different colored pens
9. Using his right and left hand and using different colored pen was done to disguise his own personal handwriting on the petitions.
10. Defendant Brandon Hall did this on all of the petitions as alleged in the Complaint and Warrant.
11. Defendant Brandon Hall was picked up by Mr. Houghtaling on May 1, 2012 and they drove to Lansing.
12. On the way to Lansing Defendant Brandon Hall continued to place false names and signatures on the nominating petitions.
13. The petitions were filed with the Bureau of Elections and the Secretary of State Bates stamped the petitions 29-66 and all reflect Brandon Hall as the circulator of the petitions.
14. Defendant Hall realized that the only way he was going to get the required signatures was to "fake" the signatures while they were driving up to Lansing.

15. Defendant Hall used the 2010 petitions and copied numerous names from the 2010 petition onto the 2012 petitions.
16. All of this was done in order to get the required number of signatures on the nominating petitions to have filed with the Secretary of State.
17. Defendant Hall put false names and signatures on the nominating petitions as alleged in the complaint and warrant as well as signed the petitions as the circulator.

Gregory J. Townsend for DHK

in / Attorney

Gregory J. Townsend (P-35857)
Assistant Attorney General

DH

Donald H. Hann (P- 14608)
Attorney for Defendant

EXHIBIT

B

STATE OF MICHIGAN
IN THE 58TH DISTRICT COURT FOR THE COUNTY OF OTTAWA

* * * * *

STATE OF MICHIGAN,

Plaintiff,

Vs.

File No. GH-13-32796-FY

HON. BRADLEY S. KNOLL

BRANDON MICHAEL HALL,

Defendant.



"GH13032796FY"

OPINION and ORDER

At a session of the Court held in the
City of Holland, County of Ottawa, State of Michigan
on the 21st day of October, 2013.

The defendant in the above matter, Brandon Hall, is charged in a ten-count complaint with ten separate counts of Election Law – Forgery contrary to MCL 168.937. The People move to bind over on the complaint. In lieu of testimony, the People and the Defendant have filed a stipulated statement of facts, which is appended to this Opinion and Order.

According to those stipulated facts, Mr. Hall was assisting Chris Houghtaling in an effort to obtain sufficient signatures on nominating petitions to place Mr. Houghtaling's name on the ballot for the 2012 election to fill a judicial vacancy in the 58th District Court. On the evening before and the day of the deadline for the filing of those petitions, Defendant added several names to those petitions using petitions which had been circulated by Houghtaling

OPINION and ORDER

prior to the 2010 judicial elections. Defendant added the names by copying the signatures from the 2010 petitions and then filed the petitions with the Secretary of State, signing the petitions himself as the circulator. The ten counts of the complaint represent each separately stamped petition certified by the defendant which includes the signatures of other persons inserted by him.

The statute under which the People proceed reads as follows:

168.937 Forgery; penalty.

Sec. 937. Any person found guilty of forgery under the provisions of this act shall, unless herein otherwise provided, be punished by a fine not exceeding \$1,000.00, or by imprisonment in the state prison for a term not exceeding 5 years, or by both such fine and imprisonment in the discretion of the court.

This section of the Michigan Election Law has not been amended since the law was enacted as PA 1956 No. 116. As originally enacted, the Michigan Election Law contained no definition of forgery. Although forgery is codified and defined as part of the Michigan Penal Code (MCL 750.248), it is not defined in the election law provisions. The People's brief uses the common law elements of forgery. The Court believes that where a common law offense is undefined in a statute that the common law meaning applies. Gilbert v. United States, 370 US 650 (1962), People v. Couch, 436 Mich 414(1990).

Applying the common law elements as set forth in the cases cited by the People, this Court would find probable cause to believe that the conduct set forth in the stipulated facts would constitute common law forgery. This is based on the arguments of counsel at the motion hearing and further assumes a definition of instrument which is broad enough to encompass the nominating petitions in question and a definition of fraudulent intent that would be sufficient under the common law.

The Defense maintains however, that the forgery statute under which Mr. Hall is charged is not applicable to the conduct in question. The Defense cites section 544c of the

OPINION and ORDER

Michigan Election Law (MCL 168.544c) as providing the exclusive penalty for the falsified signatures. That section reads, in part as follows:

- Sec. 544c. (1) A nominating petition ... shall be in the following form:
 ...Warning-A circulator knowingly making a false statement in the above certificate, a person not a circulator who signs as a circulator, or a person who signs a name other than his or her own as circulator is guilty of a misdemeanor...
- (7) An individual shall not do any of the following:
 (a) Sign a petition with a name other than his or her own.
 (b) Make a false statement in a certificate on a petition.
 (c) If not a circulator, sign a petition as a circulator.
 (d) Sign a name as circulator other than his or her own.
 (8) An individual who violates subsection (7) is guilty of a misdemeanor punishable by a fine of not more than \$500.00 or imprisonment for not more than 93 days, or both...
- (14) The provisions of this section except as otherwise expressly provided apply to all petitions circulated under authority of the election law. (Emphasis supplied)

The People respond by correctly pointing out that the misdemeanor provisions of that section do not include the specific intent to defraud found at common law forgery. That section in fact contains no intent requirement other than in that found in the mandatory petition warning language that a circulator who "knowingly" makes a false statement etc. is guilty of a misdemeanor. This Court would view the concept of "knowingly" as akin to "willfully" (encompassing both knowing and purposeful) and involving something less than a specific intent to defraud. People v Lockett(On Rehearing), 253 Mich.App. 651 (2002).

The Court also agrees that the People have considerable discretion in charging decisions under two or more applicable criminal charges. People v. LaRose 87 Mich App 298(1978) It should be noted here however, that the more specific provisions of Section 544c were enacted subsequent to the more general forgery statute. An exception to the prosecutor's discretion exists in these situations. The La Rose decision states:

OPINION and ORDER

It is a basic rule of statutory construction that a statute specific in language and enacted subsequent to a general statute covering the same subject matter constitutes an exception to the general statute if there appears to be a conflict between the two statutes. State Highway Comm'r v. Detroit City Controller, 331 Mich. 337, 358, 49 N.W.2d 318 (1951); People v. McFadden, 73 Mich.App. 232, 251 N.W.2d 297 (1977); People v. Bachman, 50 Mich.App. 682, 213 N.W.2d 800 (1973), *lv. den.* *304 392 Mich. 776 (1974); People v. Rodgers, 18 Mich.App. 37, 170 N.W.2d 493 (1969).

This Court accepts the distinction raised by the People between the intent elements of the two statutes which are more easily understood as a legal concept than when an effort is made to determine what state of mind might make a person guilty of violating Section 544c and not guilty of violating Section 937. For the reasons that follow however, the Court does not rule on that issue.

Ultimately, the Court's ruling on the motion to bind over must be based upon a proper interpretation of the statutory provisions. The question to be resolved is whether a prosecution for forgery can take place for unlawful conduct under Section 937 of the Michigan Election Law where the conduct is not expressly identified as forgery and where, as here, that unlawful conduct is expressly punished as a misdemeanor. In that regard there are some puzzling aspects to the statute.

In the sections immediately preceding the forgery penalty section relied on by the People in bringing these charges, the Michigan Election Law defines specific conduct constituting a felony (MCL 168.932a) and specific conduct constituting perjury. (MCL 168.936). The penalty section for perjury is identical to the penalty provision for forgery. There is not, however, nor has there been a section of the election law defining forgery.

OPINION and ORDER

The penalty provisions for false petition signatures or false statements by a circulator contained in the Michigan Election Law as enacted in 1956 read, in part as follows:

168.544 Same; size, type, form; circulators, designation, affidavit; unlawful signing, penalties.

...Any person who knowingly signs more than 1 petition for the same office, except where more than 1 candidate is to be nominated, or signs any name other than his own, shall be guilty of a misdemeanor Any person who shall affix his signature to a petition as circulator thereof, knowing that he is not a qualified and registered voter, or knowing that any signature to the petition is not the genuine signature of the person purporting to sign the same, shall be guilty of a misdemeanor. Any person who shall falsely sign and swear to an affidavit attached to any such petition shall be guilty of perjury... (Emphasis Supplied)

Thus, the statute, as originally enacted, contained an express statutory provision punishing certain conduct as a misdemeanor and certain conduct as "perjury". The various amendments to the Act have never expressly indicated that the conduct prohibited under this section would constitute forgery.

Other provisions of the Michigan Election Law have expressly defined unlawful conduct as forgery. MCL 168.759(8) provides:

A person who makes a false statement in an absent voter ballot application is guilty of a misdemeanor. A person who forges a signature on an absent voter ballot application is guilty of a felony. A person who is not authorized in this act and who both distributes absent voter ballot applications to absent voters and returns those absent voter ballot applications to a clerk or assistant of the clerk is guilty of a misdemeanor. (Emphasis Supplied).

As originally passed in 1956, the Michigan Election Law contained an additional section at MCL 168.484 which read:

168.484 Same; fictitious or forged name affixed to petition unlawful, penalty.
 Sec. 484. It shall be unlawful for any person to cause, or aid and abet in causing any fictitious or forged name to be affixed to any initiative or referendum petition or to any petition proposing an amendment to the constitution of the state of Michigan, or for knowingly causing any such petition bearing fictitious or forged names to be circulated. It shall be unlawful for anyone to sign any such petition more than once, or sign a name other than his own. Any person found guilty of violating the provisions of this section shall be deemed guilty of a misdemeanor. (Emphasis Supplied).

The above-referenced Section 484 was repealed by PA 1965 No. 312. That bill also repealed Section 544 and added section 544a and 544c (MCL 168.544a-c). By doing so, the 1965 amendment eliminated the perjury provision contained in the former Section 544 and punished all conduct in violation of the new Section 544c as a misdemeanor. Section 544c, as enacted in 1965 read, in part, as follows:

Any person who shall sign a petition with a name other than his own shall be guilty of a misdemeanor.

Any person knowingly making a false statement in a certificate on any petition or any person not a circulator who signs as such or any person who signs a name as circulator other than his own shall be guilty of a misdemeanor.

Any person who shall aid or abet another in any of the above listed acts shall be deemed to have committed the act.

The provisions of this section except as otherwise expressly provided shall apply to all petitions circulated under authority of the election law.

Subsequent amendments of Section 544c have retained the original misdemeanor provisions as well as the portion quoted above which states that "except as expressly provided" the provisions of that section "apply to all petitions circulated."

The Defense argues that the subsequent amendments to Act 312 which contain language repealing inconsistent statutory provisions either directly or impliedly repeal the forgery statute, at least as it applies to false nominating petition signatures or certifications by the circulator. The Court believes the assertion tends to beg the question of "inconsistency." It also recognizes that repeal by implication is disfavored. The Court believes however, that there must be some indication of legislative intent that the forgery provisions of Section 937 should apply to the subject matter of Section 544c.

The Court must give meaning to all the words contained in a statute. Section 937 has express language that a person found guilty of forgery "... under the provisions of the act, shall unless herein otherwise provided be punished..." The designation of forgery as a felony is not expressly indicated but is presumed from the maximum possible penalty which takes the matter outside this Court's jurisdiction.

It would appear to the Court that in order to give meaning to forgery "under the provisions of the act" that the prohibited conduct must be expressly identified as forgery in the provisions of the act prohibiting that conduct. Sections of the Act have in the past and do now expressly identify certain unlawful acts as forgery. Unlawful conduct by a petition signer or circulator has never been expressly identified as forgery "under the provisions of the act" in Section 544c or its statutory antecedents.

Similarly the language of Section 544c(14) that " the provisions of this section, except as otherwise expressly provided apply to all petitions circulated under the authority of the election law" must be considered. Giving the normal meaning to that language suggests to the Court that the conduct prohibited by Section 544c must be punished in accordance with Section 544c," unless otherwise expressly provided." To hold that the language of Section 937 is an express provision providing for an enhanced punishment would be to infer what is in fact not expressed.

OPINION and ORDER

The two statutes could be more easily reconciled by allowing a prosecution for forgery to go forward but with the penalty dictated by the exclusivity provision of Section 544c(14) and consistent with the "unless herein otherwise provided" language of Section 937. Under those circumstances the matter would remain within this court's jurisdiction as a 93 day misdemeanor so that the People's motion would be denied.

Finally, this would appear to the Court to be a case where the Rule of Lenity should apply. The Rule of Lenity operates in favor of an accused, mitigating punishment when punishment is unclear. People v. Jahner, 433 Mich. 490 (1989). In the two sections of the Act where forgery is expressly prohibited the penalty is a misdemeanor. Yet where Section 544c prohibits conduct without specifying it as forgery the People assert that the more severe penalty should apply. The People urge that forgery "under the provisions of this act," means conduct prohibited by the election law can also be charged as forgery even if not so designated by the statute. Brandon Hall would argue that forgery "under the provisions of this act" means conduct expressly identified as forgery by the statute. The Court favors the latter interpretation. The People's position as to the proper interpretation of the statute is not implausible, but it must be fairly said that at best the provisions of Section 937 can be interpreted either way. As a result, the statute is ambiguous in that regard so that the Rule of Lenity would dictate that the less severe penalty of Section 544c would apply.

For the reasons stated above:

IT IS THE OPINION and ORDER OF THIS COURT that the motion of the People be and is hereby denied. The Court does however believe that probable cause has been shown to believe than an offense cognizable to the district court has been committed, specifically violation of MCL 168.544c. Pending any appeal by the People of this Court's denial of the motion to bind over, pursuant to MCR 6.110(E) and MCL 766.14(1), this matter shall proceed to trial on a ten count complaint alleging violation of MCL 168.544c.

OPINION and ORDER

October 17, 2013



Hon. Bradley S. Knoll
Chief District Court Judge

BSK/jmm

cc: Prosecutor
Attorney General
Defendant Attorney
File (original)

OPINION and ORDER

GH-13-32796-FY State of Michigan vs. Brandon Michael Hall

EXHIBIT

C

RECEIVED FEB 10 2014

STATE OF MICHIGAN

20th JUDICIAL CIRCUIT COURT FOR THE COUNTY OF OTTAWA

PEOPLE OF THE STATE OF MICHIGAN,

File No. 13-37857-AR

v

Hon. Jon A. Van Allsburg

BRANDON MICHAEL HALL,

Defendant.

ORAL ARGUMENT

BEFORE THE HONORABLE JON A. VAN ALLSBURG, CIRCUIT COURT JUDGE

Grand Haven, Michigan - Monday, January 27, 2014

APPEARANCES:

For the People: MR. RICHARD L. CUNNINGHAM (P29735)
ASSISTANT ATTORNEY GENERAL
3030 West Grand Boulevard, Suite 10-354
Detroit, Michigan 48202
(313)456-0204

For the Defendant: MR. DONALD H. HANN (P14608)
HANN PERSINGER
503 Century Lane, P.O. Box 1559
Holland, Michigan 49422-1559
(616)396-1245

Transcribed by: Ms. Lorri L. Coleman, CER 8536
Ottawa County 20th Circuit Court
414 Washington Avenue, Suite 300
Grand Haven, Michigan 49417
(616)846-8322

TABLE OF CONTENTS

WITNESSES:

Page

None

EXHIBITS:

Identified

Received

None

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Grand Haven, Michigan

Monday, January 27, 2014 - 2:47 p.m.

THE COURT: On the record in the matter of the People versus Brandon Michael Hall, file -- case number 13-37857-AR. This is an appeal from the district court and the Attorney General has appealed on behalf of the prosecutor. Glad to see you here in one piece.

MR. CUNNINGHAM: May it please the Court, Richard Cunningham, P29735, Assistant Attorney General on behalf of the People. And I would apologize to the Court for being late. I did leave Detroit at 7:30 this morning to give myself enough time, but --

THE COURT: Oh, my goodness.

MR. CUNNINGHAM: -- it didn't work out.

THE COURT: Well, glad to see you here. I'm sorry to make you come out on such a terrible day.

MR. CUNNINGHAM: It's part of the job. May I proceed?

THE COURT: Go ahead, yes.

MR. CUNNINGHAM: Thank you. Your Honor, we're before the Court today on an appeal of a district court Judge's decision following the preliminary examination. There's no factual issues involved. The parties have stipulated to all the facts. The Court has refused to bind over on the charges of felony offenses, ten counts

1 of election law forgery, instead, ruling that the facts
2 more appropriately support a misdemeanor charge under
3 MCL 168.544(C)(7). Now, the Judge gave a very detailed
4 analysis of his opinion, and well written, but he did
5 get it wrong. And I'd like to use my time in oral
6 argument really to point out some of the inconsistencies
7 or problems with the decision that he made.

8 First of all, I'd like to address the rule of
9 lenity. That's specifically one of the reasons why he
10 said that, "Look, we've got a statute here that makes it
11 specifically a misdemeanor to sign someone else's name
12 to a nominating petition." And we have charged this
13 felony of forgery based upon false statements -- of
14 false signatures on those petitions. So, the Judge
15 ruled that because the conduct was the same in both of
16 the statutes, the rule of leniency would say you really
17 should charge and be prosecuted under the lesser
18 offense.

19 Well, in making that ruling, the Judge misses
20 one very important thing. We're not talking about the
21 same conduct between those two statutes. We're talking
22 about -- in 168.544(C) we're talking about just simply
23 signing someone else's name. The crime occurs when you
24 willfully sign someone else's name. That's it. Nothing
25 else more is required. But for the election law forgery

1 that we've charged under, it would require more.
2 Forgery requires that intent -- that specific intent to
3 defraud.

4 So, we're not talking about the same conduct
5 being covered by the two statutes. In one instance just
6 signing the document is the crime, the misdemeanor. But
7 signing it with that intent -- the specific intent to
8 defraud, that's where we have that forgery. So, when
9 the Judge says the rule of leniency would go to the
10 lesser offense -- the lesser offense because, you know,
11 when the same conduct is covered by two statutes, that
12 rule applies and, again, our argument is it's not the
13 same conduct. There's very specifically different
14 conduct. One requires that specific intent to defraud
15 and the other doesn't. And the analogy here would be
16 larceny from a person versus unarmed robbery. We have
17 the same thing. We have the unarmed robbery. I mean,
18 both of them go with taking property from a person, but
19 that additional element is required on unarmed robbery
20 where the force is used. The same thing here with the
21 difference between forgery under 168.937 and that of the
22 misdemeanor offense of just signing someone else's name.

23 Now, what we have is a specific provision in
24 that statute in the election law that says:

25 "Any person found guilty of forgery under

1 provisions of this act shall, unless herein
2 otherwise provided, be punished by a fine not
3 exceeding \$1,000.00, or by imprisonment in the
4 state prison for a term not exceeding 5 years,
5 or both, such fine and imprisonment in the
6 discretion of the court."

7 Now, that statutory provision means something. The
8 legislature just doesn't throw words in. It has to have
9 some meaning and what that meaning is is really for the
10 Court to decide. Well, the only way -- the only way
11 that Court -- that statute can have any meaning at all,
12 to be anything other than superfluous, is to say that
13 there is specific conduct required -- documents required
14 under the election law, and any forgery of those
15 documents would constitute this offense of forgery under
16 provisions of this act. That's really what the Court is
17 called upon to do is to interpret that specific
18 statutory language.

19 The People argue that because there's nothing
20 in the statute itself which defines forgery, you have to
21 rely on the common law definition of forgery, and the
22 district Judge accepted that. Forgery is a presentation
23 of a document. Well, it's the document done for
24 purposes of fraud with that fraudulent intent, so it's a
25 false document. Something that purports to be what it

1 is not. And under the stipulated facts at the exam, the
2 petitions themselves were the basis of the forgery.
3 Now, we've charged ten different counts of election law
4 forgery based not on the signatures on the petitions,
5 but on the petitions themselves. Ten separate and
6 distinct petitions. If we were talking about the
7 separate crime, the misdemeanor offenses, of simply
8 signing every -- every signature on the -- on those,
9 those could be charged as a separate count, but we
10 didn't. We charged ten felony counts based upon the
11 forgery, and the document being forged is the petition
12 -- each of those ten petitions. So, we're not looking
13 at it as the misdemeanor offense of signing a document.
14 If there's fifteen names on there and one name was a
15 circulator, there'd be sixteen different counts of that
16 lesser offense on each of the petitions, but that's not
17 the way it's charged and not the way we're pursuing it.

18 The basis of the charge is simply that intent
19 to defraud; an intent that might not be present. It
20 doesn't have to be proved for the misdemeanor. There
21 are many instances where that misdemeanor could be
22 charged, and it could be supported without that intent
23 to defraud. And, again, I think we've used the example
24 of the husband and the wife. The husband signs his name
25 and his wife's name believing and knowing that she would

1 support that candidate too. Well, that violates the
2 misdemeanor provision of 168.544(C), but clearly it's
3 not a forgery because there was no intent to defraud. A
4 very different situation, very different.

5 So what the Judge failed to do in the district
6 court was recognize that there is a big distinction
7 between the elements of the signing a petition with
8 someone else's name and that specific intent required
9 for forgery. And if you don't accept that -- that
10 separate crime of forgery, then this whole provision,
11 the language of 168.937, means absolutely nothing; and
12 the legislature doesn't pass laws that have language in
13 it that mean nothing. One of the primary rules of
14 statutory interpretation is to interpret it in a way
15 that gives each provision of the statute meaning; and
16 without accepting forgery as a specific offense, there
17 would be no meaning to 168.937.

18 As the district Judge pointed out, there's only
19 one place in the entire statute where the word forgery
20 is used and that's in regard to registration -- a false
21 statement in regard to register. Now, this language
22 would have no meaning, would have no purpose, if you did
23 not interpret it in such a way that duty of forgery,
24 under provisions of this act, applies to any document
25 done under that act, that's done for a fraudulent

1 purpose, that's false and fraudulent. The district
2 Judge in dealing with that issue said, "Well, I think
3 the legislature intended sometime in the future to put
4 in some forgery provisions, and they just never got
5 around to it." Well, that's -- that's a speculative
6 interpretation. He's speculating that that's what that
7 purpose of that language would be, that someday they're
8 going to bring in more provisions that would give that
9 meaning, but that's purely speculative. And unless and
10 until the legislature does add those, this has to be
11 given meaning on its own. And the only way to give it
12 meaning on its own is to recognize it as a separate and
13 distinct offense carrying additional elements over and
14 above those required by the misdemeanor. And I thank
15 you.

16 THE COURT: All right. Thank you. Mr. Hann?

17 MR. HANN: May it please the Court, Donald
18 Hann, attorney for Mr. Hall. Mr. Cunningham says that
19 it's conduct that is to be punished, but then he says,
20 no, it's intent that is to be punished. Now, the
21 conduct is something, I think, that's manifest to what
22 you do. And he pointed out the difference between
23 larceny from a person and unarmed robbery, and there is
24 a different element. Now, that element in unarmed
25 robbery is force. I can reach over and, if I'm skillful

1 enough, pick Mr. Hall's pocket and he doesn't know it.
2 That's larceny from a person. If I come up, grab him by
3 the neck, and say, "Give me your money," that's force.
4 That is conduct. There is -- if you look at conduct,
5 there is no difference in the conduct of signing a name
6 on a petition; a false name or signing it as a false
7 circulator. That is the conduct. That is all that is
8 involved. Now, I could make an argument that there is
9 only one reason that you would falsely put a name down
10 and that is to deceive somebody. It's not a matter of,
11 "I thought I had authority;" that would not be forgery.
12 So, I think the conduct argument falls because by his
13 very example, he's talking about obvious and open
14 conduct in the differentiation between unarmed robbery
15 and larceny from a person.

16 Now, if you look at the forgery statute under
17 criminal law, it doesn't say "unless otherwise
18 provided". Now, I'm not quite sure. I have an entirely
19 different view point on what "otherwise provided" would
20 mean in this statute. And the only way it makes sense,
21 they all -- they're all part of the Michigan election
22 laws, separate section MCL 168 et seq. They are
23 involved there, and 937 provides forgery under the
24 election law as a crime. Now, it doesn't define
25 forgery, and there may be intents that it doesn't set

1 forth that would be forgery therein. There is the voter
2 registration, which I believe is a felony. There may be
3 other things that you sign that are felonies, unless
4 otherwise provided. Now, if there is no other provision
5 in the act, that might make no sense, but there is.
6 There's the 544(C)(7) that lays out the specific
7 conduct.

8 Now, when they put all these acts together,
9 they presume that they know what they are doing. Now,
10 that's a legal fiction, perhaps, that the legislature
11 knows what it's doing, but that's a presumption that we
12 operate under; and they made a different provision. And
13 I'm repeating some of the arguments that I put in my
14 brief, and I'm sure you've read it, but it makes sense.
15 Okay. "Unless otherwise provided. Any other provision?
16 Yes, right here. If you do these things, it's a
17 misdemeanor."

18 Judge Knoll did not address my due process
19 argument, and that is to state such forth, right on the
20 petition. And it's a matter of statute that if you do
21 these things, you are guilty of a misdemeanor. Now,
22 even if you may be judged to know the law, if you're
23 familiar with all the statutory code, it would be no
24 defense to say, "Well, I didn't know that was in the
25 law." But if you have a petition right in front of you

1 mandated by the legislature that says if you do these
2 specific things, you are guilty of a misdemeanor, it
3 would seem to be a denial of due process then for the
4 state to come along and chuckle and say, "Oh, just
5 kidding. We're also going to hit you with this." It's
6 laid out there and when a person of commonsense look at
7 this and say, "This is a misdemeanor if I do it," and
8 then when a person of commonsense may read "unless
9 otherwise provided", then you see an "otherwise"
10 provision on the very acts are misdemeanors, you'd say,
11 "Oh, that is not a forgery. That is a misdemeanor."
12 So, I think the only logical way to read this is a
13 misdemeanor. And it would just be a denial of due
14 process -- I haven't found a case like that. I'll admit
15 that -- but the general idea of due process is basic
16 fairness to people. To on the mandatory petition say,
17 "If you do these very acts, mister, all you're guilty of
18 is a misdemeanor," and then pretend that in invisible
19 ink that he didn't see, "or it could be a felony if the
20 attorney general thinks so." Thank you.

21 THE COURT: Mr. Cunningham, any further
22 response?

23 MR. CUNNINGHAM: A very short rebuttal, your
24 Honor. In regard to that provision that says "unless
25 herein otherwise provided", the only fair reading of

1 that provision is it throws back and modifies forgery.
2 So, it talks about -- "unless herein otherwise provided"
3 talks about forgery. It doesn't talk about acts of
4 writing someone else's name or it doesn't talk about
5 other violations of the act. It talks specifically
6 about forgery and has to be viewed as emphasizing
7 forgery, and the conduct that's covered in that
8 misdemeanor statute does not rise to forgery. The
9 conduct does not require the specific intent to defraud.
10 The arguments return to conduct and being different.
11 Well, it's the intent with which that conduct is done
12 that makes a difference. That's the difference between
13 unarmed robbery the -- of a larceny from a person. It
14 would be the difference between second degree murder and
15 first degree murder. With second degree murder, you
16 need an intent to kill or intent to do great bodily harm
17 or the intent to create a high risk. With the first
18 degree murder, you need a specific intent to kill. So,
19 they're very different in the elements, but they both
20 require that a life be taken, and that's what we have
21 here. They both require -- they have that similarity in
22 terms of the false signing of someone else's name, but
23 to do a forgery, it requires more and we have the
24 evidence in this case that there is more.

25 THE COURT: So, Mr. Cunningham, would you

1 agree then that an individual, who violates section
2 544(C)(7) by signing a petition with a name other than
3 his or her own, would be guilty of forgery --

4 MR. CUNNINGHAM: No.

5 THE COURT: -- if they did so with intent to
6 deceive?

7 MR. CUNNINGHAM: Only if they had the intent.
8 Only if they had that. That's an additional element.
9 Forgery, you know, requires more. You have to have the
10 intent to -- a false document would be an attempt to
11 defraud.

12 THE COURT: If someone who violates subsection
13 (C)(7)(a) then would be a forgerer if they signed a name
14 other than their own with the intent to defraud, but
15 perhaps would not be forgerer if they simply, let's say,
16 signed a nickname rather than their own name or signed a
17 spouse's name without the intent to defraud?

18 MR. CUNNINGHAM: Signing the spouse's name I
19 think is the appropriate analogy. But that would be
20 just the same as I take property either without -- from
21 the person without force or with force. And that's a
22 big distinction, the difference between larceny from a
23 person and unarmed robbery.

24 The difference between this particular
25 misdemeanor statute and the forgery -- the common law

1 forgery is that intent and the intent to defraud. And
2 you don't have to have that intent to defraud in this
3 case, you know, in that -- to violate that statute.
4 Now, what we're saying then in this case is that he did
5 have that intent. We can prove not only the elements of
6 the misdemeanor but also the forgery. And under these
7 circumstances, the misdemeanor merges into the forgery
8 because the false statement that he's making is signing
9 somebody else's name. So, that additional element is
10 present here. It doesn't have to be. He could be
11 charged and convicted of that misdemeanor offense.

12 THE COURT: He could be properly charged under
13 either statute then is in your view --

14 MR. CUNNINGHAM: Well, under these factual
15 circumstances, yes. But don't forget that's only
16 because the facts establish that state of mind. The
17 state of mind is the intent to defraud. Now, if it
18 wasn't for us being -- I mean, that's something that we
19 would have to prove to a jury, and I think there's --
20 there's from the stipulations fairly strong evidence
21 here. Now, there's -- you know, this is not uttering
22 and publishing. This is forgery so there's no
23 requirement that it be filed; but when he files it with
24 the Secretary of State, I think that is some evidence of
25 the unlawful intent. You know, if somebody signs their

1 spouse's name and an ethical and honest circulator would
2 see that, they'd cross it off before it was filed.
3 We've all seen a lot of petitions where they're crossed
4 off because the circulator recognizes it's a bad
5 signature. So, yes, if the person signed the wife's
6 name, that's a violation of the misdemeanor. But to do
7 it with the intent that we have here, to violate the
8 purity of the election law, to pass a fraud on the
9 Secretary of State, that's more than just this
10 misdemeanor.

11 THE COURT: All right. Thank you.

12 Interesting legal argument, and there's plenty of room
13 for argument on both sides here. The defendant relies
14 on primarily *People v LaRose*, 87 Michigan Appeals 298,
15 an early case -- it's still good law -- that held that
16 where the legislature enacts legislation that is
17 specific and carries the lesser penalty than the general
18 statute, then the specific legislation controls. And it
19 is quite clear that in the election law, there's a
20 general forgery statute, which says in section 168.937:

21 "Any person found guilty of forgery under
22 the provisions of this act shall, unless herein
23 otherwise provided, be punished by a fine not
24 exceeding \$1,000.00, or by in prison in the
25 state prison for a term a term not exceeding

1 five years, or by both such fine and

2 imprisonment in the discretion of the court."

3 So, the general forgery section of the election law
4 makes forgery a felony, but the statute itself says
5 "unless otherwise herein provided"; "herein" referring
6 to the election law. And the legislature, oh, about ten
7 years later after the adoption of the initial general
8 statute, enacted a specific section of the statute, MCL
9 168.544(C), which says in subsection (7):

10 "An individual shall not do any of the
11 following: (a) sign a petition with a name
12 other than his or her own, (b) make a false
13 statement in a certificate on a petition."

14 And (c) and (d), are not applicable here.

15 Subsection (8) goes on to say:

16 "An individual who violates subsection (7)
17 is guilty of a misdemeanor punishable by a
18 fine of not more than \$500.00 or imprisonment
19 for not more than 93 days, or both."

20 So, under the circumstances presented in this
21 case, given that there is an allegation supported by
22 some evidence that the signing of the petition with a
23 name other than his or her own was done deliberately
24 with the intention to mislead the Secretary of State,
25 the state argues that Mr. Hall can be charged with a

1 felony for that action of signing a petition with a name
2 other than his or her own under the general forgery
3 statute contained in the election law. Defense argues
4 that the later statute, which specifically addresses the
5 conduct at issue, makes this a misdemeanor and because
6 it's a later adopted statute with a more specific
7 definition and a lesser penalty, under *People v LaRose*,
8 the later statute controls.

9 The state cites the case of *People v Shaw*, 27
10 Michigan Appeals 325, a 1970 decision, which
11 distinguished. And another case that rules, cited in
12 *LaRose*, said if the two laws don't cover the same
13 subject matter and don't necessarily involve the same
14 elements, then perhaps they can both be charged. In the
15 *LaRose* case, an individual was charged under the felony
16 false pretenses statute in circumstances involving the
17 presentation of an insufficient funds check. And the
18 Court of Appeals overturned that and said the prosecutor
19 was bound to charge defendant under the statute which
20 fit the particular facts and not under the more general
21 statute, and decided it was a misdemeanor NSF charge
22 rather than a felony false pretenses in that case.

23 This is one of those cases where the citation
24 of the rule where specific and general statute
25 encompasses the same matter, the specific will prevail

1 especially when the specific was enacted after the
2 general. The defense cited *First Bank of Cadillac v*
3 *Miller*, 131 Michigan Appeals 764, a 1984 decision, but
4 the state says that that should be distinguished here
5 because they don't necessarily encompass the same
6 subject matter where the difference is the presence or
7 lack of presence of an intent to defraud as required in
8 the general fraud statute.

9 It is, I think, relevant here that the
10 Secretary of State has produced, in compliance with the
11 legislature's requirement, nominating petitions in
12 compliance with the election law that specifically state
13 that violation of the statute is a misdemeanor. That
14 calls forth the argument and the rule cited by Judge
15 Knoll, called the rule of lenity. I don't know if it's
16 lenity or if it should be leniency. In any event --

17 MR. CUNNINGHAM: It is lenity.

18 THE COURT: Lenity?

19 MR. CUNNINGHAM: Yeah. He spelled it
20 correctly, your Honor.

21 THE COURT: Okay. Leniency sounds more
22 grammatically accurate, but I guess we're talking about
23 the same thing.

24 MR. CUNNINGHAM: We see it in a lot in medical
25 marijuana prosecutions.

1 THE COURT: Okay. The rule operates in favor
2 of the defense mitigating punishment when the punishment
3 is unclear. If one follows the argument of the state
4 here that the difference between the two statutes is the
5 presence or non-presence of an intent to defraud, you
6 could clarify that and say this isn't a case in which
7 the punishment is unclear. It's that it applies -- the
8 felony statute applies only when you can plausibly argue
9 an intent to defraud. However, as defense notes, the
10 conduct of signing a name not one's own is identical in
11 each case.

12 I think that in addition to the rule of lenity,
13 there is a valid due process argument here. Due process
14 indicates that when one is to be charged with a
15 violation of criminal law, there'd be clear indication
16 of what the penalty is; so, theoretically, a potential
17 defendant can determine whether or not to conform his
18 conduct to the law based upon the degree of penalty. At
19 least that's one way of putting the argument. It
20 operates in the same way as the rule of lenity in that
21 one gives the -- the less severe penalty to the
22 defendant where the actual penalty is unclear. If one
23 were to read the nominating petitions required by
24 statute and produced by the Secretary of State, one
25 would conclude that the prohibited conduct is a

1 misdemeanor. One doesn't realize it's a felony unless
2 one goes to the general forgery statute or the common
3 law definition of forgery. But it seems to conflict
4 with the -- that basic rule of statutory construction;
5 that you apply the specific where it applies, the
6 general where it doesn't, particularly where the
7 specific statute is the later enacted statute.

8 I think there's logical arguments on both sides
9 of the question here. But given that the state has
10 mandated that the public be informed through its
11 nominating petitions that the conduct at issue is a
12 misdemeanor and doesn't clarify at all whether or not
13 intent to defraud is a relevant consideration, it's
14 simply the signing of a false name is a misdemeanor. I
15 think that has to be relied upon whether one cites the
16 rule of lenity or due process and hold the state to its
17 public pronouncements as to what the crime is.

18 So, I'm going to affirm the decision of the
19 district court. If the legislature wants to retain the
20 right to allow prosecutors to charge those who sign
21 false names on nominating petitions with forgery, it
22 really ought to clarify the statute, and perhaps add to
23 section 544(C) that the offense is a misdemeanor unless
24 there is an intent to defraud, in which case it's a
25 felony. They could certainly make that distinction, but

1 they didn't when they adopted the misdemeanor penalty,
2 so, the case is affirmed.

3 MR. HANN: Thank you, your Honor.

4 MR. CUNNINGHAM: Will you be entering a
5 written order or do you want us to draft an order?

6 THE COURT: I would prefer to have you draft
7 an order.

8 MR. CUNNINGHAM: All right.

9 THE COURT: I've stated an opinion on the
10 record just to get this resolved quickly.

11 MR. HANN: Do you want to draft it?

12 MR. CUNNINGHAM: Yeah. I'll draft it and mail
13 it to you.

14 THE COURT: All right.

15 MR. HANN: That would be cheaper for the
16 county for the state to pick it up.

17 THE COURT: All right.

18 MR. HANN: Okay. Thank you.

19 MR. CUNNINGHAM: We do plan on seeking leave.

20 THE COURT: That's fine.

21 MR. CUNNINGHAM: So I'd like to have it
22 entered. Can we just do it by mail? Is that all right,
23 your Honor?

24 THE COURT: That's fine.

25 MR. CUNNINGHAM: All right.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. HANN: And then your opinion was being recorded?

MR. CUNNINGHAM: Yeah.

THE COURT: It's on the record.

MR. HANN: Okay. Thank you.

THE COURT: So you can order a transcript and hopefully the Court of Appeals can follow up the argument, but I didn't add anything other than the parties had already cited in their respective briefs.

MR. CUNNINGHAM: Well, thank you, your Honor.

THE COURT: Thank you. We're adjourned.

(At 3:17 p.m., hearing concluded)

STATE OF MICHIGAN

COUNTY OF OTTAWA

I certify that that this transcript, consisting of 24 pages, is a complete, true, and correct record of the videotape of the proceedings and testimony taken in this case as recorded on Monday, January 27, 2014.

Date:

2-7-14



Lorri L. Coleman, CER 8536

Ottawa County 20th Circuit Court

414 Washington Avenue, Suite 300

Grand Haven, Michigan 49417

(616) 846-8322

EXHIBIT

D

STATE OF MICHIGAN
COURT OF APPEALS

DEFENDANTS COPY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BRANDON MICHAEL HALL,

Defendant-Appellee.

UNPUBLISHED

October 23, 2014

No. 321045

Ottawa Circuit Court

LC No. 13-037857-AR

Before: BORRELLO, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

The prosecution appeals by delayed leave granted a February 6, 2014, circuit court order affirming an October 21, 2013, district court order, wherein the district court denied the prosecution's motion to bind over defendant on 10 counts of felony election law forgery, MCL 168.937, and instead bound him over on 10 misdemeanor counts under MCL 168.544c. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

The essential facts of this case are not in dispute. Defendant was originally charged with 10 counts of "Election Law – Forgery," contrary to MCL 168.937. Following defendant's arraignment on those charges, and to facilitate the district court's bindover determination, the parties stipulated to the essential facts of the case in lieu of taking testimony at a preliminary examination. Specifically, the parties stipulated that in 2012, defendant worked for Chris Houghtaling's campaign for the office of judicial district court judge to obtain the necessary signatures on nominating petitions. On the night before the nominating petitions were due, realizing that he did not have enough signatures, defendant "worked all night writing names and addresses of individual[s] on the nominating petitions and signing their signatures to the petitions." Defendant used different colored ink pens and used his left and right hand to fill in the signatures. Defendant continued filling in signatures on the way to Lansing the following morning and he was identified on the petitions as the circulator. Defendant submitted the petitions to the Secretary of State. Defendant stipulated that he put "false names and signatures

on the nominating petitions as alleged in the complaint and warranted as well as signed the petitions as the circulator.”

A separate count of forgery was charged for each of ten nominating petitions that defendant submitted to the Secretary of State containing forged signatures.¹ The district court accepted the stipulation, and the prosecution moved to bind over defendant on the 10 felony charges. Defendant objected, asserting that the stipulated facts established only a misdemeanor offense under MCL 168.544c, which proscribed acts of “falsifying electoral nominating petitions” including signing a petition “with a name other than his or her own.”

On September 5, 2013, the district court held a hearing on the prosecution’s motion for bind over. The parties agreed that, based on the stipulated facts, there was sufficient probable cause to bind defendant over on the 10 felony forgery charges, but identified the issue as whether the charged statute, MCL 168.937, was appropriate in light of the existence of the separate statute, MCL 168.544c.

Defendant argued that MCL 168.937, which proscribed “forgery,” was a general statute that did not specifically proscribe defendant’s conduct, and that MCL 168.544c, enacted after MCL 168.937, was a more specific statute, in that it specifically proscribed “acts of falsifying electoral nominating petitions,” which was the conduct alleged in this case. As a more specific statute, it controlled over the more general forgery statute. Defendant argued this was especially the case where the general forgery statute included the qualifying phrase “unless otherwise provided,” which alluded to the fact that there are other, more specific statutes proscribing election law misconduct. Defendant further pointed to the fact that the Legislature requires warnings on nominating petitions which advise that falsifying a petition constitutes a misdemeanor. Defendant asserted that it would be “unseemly” to advise a person that falsifying a petition is a misdemeanor, only to then allow for a felony prosecution. Defendant concluded that the stipulated facts made it “clear” that defendant’s conduct was “not a violation of the general forgery statute,” but rather fell within the scope of the misdemeanor statute.

The prosecution responded that the misdemeanor offense found in MCL 168.544c required no intent to defraud, whereas the general forgery statute did require such an intent, thereby demonstrating that they were two separate crimes. According to the prosecution, the stipulated facts in this case sufficiently demonstrated that defendant forged multiple signatures on multiple petitions with the intent to defraud the Michigan Secretary of State. Under such circumstances, defendant was properly charged under the felony forgery statute and not the misdemeanor unlawful signing statute.

On October 21, 2013, the district court issued its written opinion and order denying the prosecution’s motion to bind over defendant on the 10 felony counts of forgery. The court first

¹ The prosecution states that each of the ten petitions contained multiple false signatures. However, since defendant was being charged with felony forgery, rather than with the misdemeanor of signing someone else’s name to a nominating petition, the charges were based on the number of forged documents rather than the number of false signatures.

acknowledged that the Michigan election law provisions do not define forgery, and therefore indicated its belief that the common law meaning of that term applied. Applying the common law elements of forgery, the court indicated that there was “probable cause to believe that the conduct set forth in the stipulated facts would constitute common law forgery” under MCL 168.937. The court then acknowledged that although MCL 168.544c specifically proscribes falsifying a signature on a nominating petition, that provision contains no intent requirement, and further acknowledged that the prosecution has “considerable discretion” in deciding under which statute to charge a defendant. Notwithstanding these acknowledgments, the district court noted that an exception to the prosecution’s charging discretion exists where a more specific statute is enacted after a general statute. Accepting the distinction raised by the prosecution between the intent elements of the two statutes, the court identified the question to be resolved as “whether a prosecution for forgery can take place for unlawful conduct under Section 937 of the Michigan Election Law where the conduct is not expressly identified as forgery and where, as here, that unlawful conduct is expressly punished as a misdemeanor.” The district court answered this question in the negative. The court reasoned in part as follows:

The Court must give meaning to all the words contained in a statute. Section 937 has express language that a person found guilty of forgery “. . . under the provisions of the act, shall unless herein otherwise provided be punished . . .” The designation of forgery as a felony is not expressly indicated but is presumed from the maximum possible penalty which takes the matter outside this Court’s jurisdiction.

It would appear to the Court that in order to give meaning to forgery “under the provisions of the act” that the prohibited conduct must be expressly identified as forgery in the provisions of the act prohibiting that conduct. Sections of the Act have in the past and do now expressly identify certain unlawful acts as forgery “under the provisions of the acts” in Section 544c or its statutory antecedents.

Similarly the language of Section 544c(14)^[2] that “the provisions of this section, except as otherwise expressly provided apply to all petitions circulated under the authority of the election law” must be considered. Giving the normal meaning to that language suggests to the Court that the conduct prohibited by Section 544c must be punished in accordance with Section 554c, “unless otherwise expressly provided.” To hold that the language of Section 937 is an express provision providing for an enhanced punishment would be to infer what is in fact not expressed.

* * *

² MCL 168.544c has been amended and renumbered since the time this case was decided. MCL 168.544c(14), referenced by the district court above, is now MCL 168.544c(18). See 2014 PA 94.

Finally, this would appear to the Court to be a case where the Rule of Lenity should apply. The Rule of Lenity operates in favor of an accused, mitigating punishment when punishment is unclear . . . In the two sections of the Act where forgery is expressly prohibited the penalty is a misdemeanor. Yet where Section 544c prohibits conduct without specifying it as forgery the People assert that the more severe penalty should apply. The People urge that forgery "under the provisions of this act," means conduct prohibited by the election law can also be charged as forgery even if not so designated by the statute. Brandon Hall would argue that forgery "under the provisions of this act" means conduct expressly identified as forgery by the statute. The Court favors the latter interpretation. The People's position as to the proper interpretation of the statute is not implausible, but it must be fairly said that at best the provisions of Section 937 can be interpreted either way. As a result, the statute is ambiguous in that regard so that the Rule of Lenity would dictate that the less severe penalty of Section 554c would apply.

Based on the above reasoning, the district court denied the prosecution's motion to bind over defendant on the 10 felony counts. However, the court concluded that there was sufficient probable cause to bind over defendant on 10 misdemeanor violations of MCL 168.544c, and therefore expressed its intent to proceed to trial on those 10 misdemeanor counts in the absence of an appeal.

On October 31, 2013, the prosecution appealed the district court's order to the circuit court. The prosecution argued that the district court erred in refusing to bind over on the felony charges. Specifically, the prosecution argued that the district court erred when it applied the rule of lenity in support of its decision because the felony and misdemeanor offenses do not involve the same conduct. The misdemeanor statute simply penalizes the signing of someone else's name to a nominating petition, while the felony statute requires an additional finding that the signing of the document was done with the specific intent to defraud. Accordingly, while the prosecution could have charged defendant with a misdemeanor offense for every single false signature he signed, it decided instead to charge ten felony counts based upon the forging of 10 nominating petitions. The prosecution further argued that the language of MCL 168.937 would mean "absolutely nothing" if it could not be read to create a separate crime of forgery. The district court's construction of the election law renders MCL 168.937 a nullity because it fails to recognize that the statute creates a "separate and distinct offense carrying additional elements over and above those required by the misdemeanor."

Defendant responded that the conduct punished as a felony and the conduct punished as a misdemeanor was the same, i.e., the signing of someone else's name on a nominating petition. Moreover, while MCL 168.937 proscribes "forgery" generally, it does not define the term "forgery." However, MCL 168.544c specifically proscribes the conduct at issue, and is therefore more specific. Accordingly, it controls over MCL 168.937. Finally, defendant responded that his due process rights would be violated by charging him with a felony offense because each petition warns that signing someone else's name constitutes a misdemeanor.

In response, the prosecution reiterated that the intent element present in the felony, but not in the misdemeanor, rendered the two provisions separate. Under the facts in this case,

defendant could properly be charged under either statute, but only because there was evidence of defendant's specific intent to defraud.

The circuit court rejected the prosecution's position and affirmed the district court's ruling. The circuit court first reasoned that MCL 168.544c, as a more recent and more specific statute governing defendant's conduct, controlled over MCL 168.937, the "general forgery statute." Next, the circuit court remarked that it was "relevant" that the Secretary of State had produced nominating petitions, in compliance with the election law, which "specifically state that violation of the statute is a misdemeanor." "That calls forth the argument and the rule cited by [the district court] called the rule of lenity[.]" which operates in favor of mitigating punishment when punishment is unclear. While recognizing the prosecution's argument that the two statutes are different inasmuch as one apparently contains the element of intent to defraud, the circuit court also acknowledged defense counsel's argument that "the conduct of signing a name not one's own is identical in each case."

Finally, the circuit court found a "valid due process argument" in the fact that the nominating petitions required a warning that the prohibited conduct is a misdemeanor. "One doesn't realize it's a felony unless one goes to the general forgery statute or the common law definition of forgery." The circuit court concluded:

I think there's logical arguments on both sides of the question here. But given that the state has mandated that the public be informed through its nominating petitions that the conduct at issue is a misdemeanor and doesn't clarify at all whether or not intent to defraud is a relevant consideration, it's simply the signing of a false name is a misdemeanor. I think that has to be relied upon whether one cites the rule of lenity or due process and hold the state to its public pronouncements as to what the crime is.

So, I'm going to affirm the decision of the district court. If the legislature wants to retain the right to allow prosecutors to charge those who sign false names on nominating petitions with forgery, it really ought to clarify the statute, and perhaps add to section 544(C) [sic] that the offense is a misdemeanor unless there is an intent to defraud, in which case it's a felony. They could certainly make that distinction, but they didn't when they adopted the misdemeanor penalty, so, the case is affirmed.

This Court granted the prosecution's delayed application for leave to appeal the circuit court's order and granted motions for immediate consideration and to stay the proceedings. *People v Hall*, unpublished order of the Court of Appeals, entered April 24, 2014.

II. STANDARD OF REVIEW

"Whether conduct falls within the scope of a penal statute is a question of statutory interpretation" that we review de novo. *People v Flick*, 487 Mich 1, 8-9; 790 NW2d 295 (2010). We review a district court's decision whether to bind over a defendant for an abuse of discretion, but review the court's rulings concerning questions of law de novo. *Id.* at 9. "A circuit court's decision with respect to a motion to quash a bindover is not entitled to deference because this

Court applies the same standard of review to this issue as the circuit court. This Court essentially sits in the same position as the circuit court when determining whether the district court abused its discretion.” *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000). An abuse of discretion occurs when “the court chooses an outcome that falls outside the range of reasonable and principled outcomes.” *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

A prosecutor has broad charging discretion and may charge any offense supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). This Court “review[s] a prosecutor’s charging determination under an ‘abuse of power’ standard to determine if the prosecutor acted contrarily to the Constitution or law.” *People v Russell*, 266 Mich App 307, 316; 703 NW2d 107 (2005). Constitutional issues are reviewed de novo. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

III. ANALYSIS

The first question that must be addressed is whether MCL 168.937 creates the substantive offense of forgery. More specifically, the question is whether MCL 168.937 can be fairly read as proscribing the broad offense of forgery that pertains to the falsifying a document governed by the Michigan election law, or whether it is merely a penalty provision for the specific forgery offenses set forth in other provisions of the Michigan election law.

This question presents an issue of statutory construction. As our Supreme Court stated in *People v Gillis*, 474 Mich 105, 114-115; 712 NW2d 419 (2006),

our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. The words of a statute provide the most reliable evidence of its intent. The Court must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme . . . If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. [Internal quotation marks and citations omitted.]

The Michigan election law, MCL 168.1 *et seq.*, was enacted for the stated purpose of, among other things, regulating primaries and elections; providing for the “purity” of the election process; and guarding against “the abuse of the elective franchise.” 1954 PA 116. Chapter XXXV of the Michigan election law sets forth “Offenses and Penalties.” Included within that chapter is MCL 168.937, titled “Forgery; penalty.” This statute provides:

Any person found guilty of forgery under the provisions of this act shall, unless herein otherwise provided, be punished by a fine not exceeding \$1,000.00, or by imprisonment in the state prison for a term not exceeding 5 years, or by both such fine and imprisonment in the discretion of the court.

Reviewing this statute in the context of the Michigan election law as a whole, indicates that MCL 168.937 is not merely a penalty provision, but rather creates a substantive offense of forgery. Importantly, MCL 168.935, another statute contained within the “Offenses and Penalties” chapter of the Michigan election law, specifically sets forth the penalties to be imposed for felony offenses under the Michigan election law:

Any person found guilty of a felony under the provisions of this act shall, unless herein otherwise provided, be punished by a fine not exceeding \$1,000.00, or by imprisonment in the state prison for a term not exceeding 5 years, or by both such fine and imprisonment in the discretion of the court.

The language of MCL 168.937 and MCL 168.935 is identical, except that MCL 168.935 uses the word "felony" and MCL 168.937 uses the word "forgery." Thus, because MCL 168.935 sets forth the penalties for a felony conviction under the provisions of the Michigan election law, reading MCL 168.937 also as merely a penalty provision would effectively render MCL 168.937 duplicative of MCL 168.935 and mere surplusage. "This Court must avoid a construction that would render any part of a statute surplusage or nugatory." *People v Redden*, 290 Mich App 65, 76-77; 799 NW2d 184 (2010). In other words, there would be no need for MCL 168.937 to be limited to setting forth the penalty provisions for forgery if MCL 168.935 sets forth the penalty provisions for all felonies under election law. In addition, reading MCL 168.937 as merely a penalty provision, and not a provision creating a substantive offense of forgery, would contravene the expressed intent of the Legislature, which was to ensure the fairness and purity of the election process in part by proscribing misconduct that would foster such unfairness and impurity. See *Gillis*, 474 Mich at 114-115 ("our primary task in construing a statute, is to discern and give effect to the intent of the Legislature.")

Having concluded that MCL 168.937 authorizes a forgery charge, we proceed to consider whether MCL 168.544c is nevertheless controlling in this case.

It is a well-settled principle that "statutes that relate to the same subject or that share a common purpose are *in para* [sic *pari*] *materia* and must be read together as one." *People v Buehler*, 477 Mich 18, 26; 727 NW2d 127 (2007) (quotations and citation omitted). "When there is a conflict between statutes that are read *in par[i]* *materia*, the more recent and more specific statute controls over the older and more general statute." *Id.* This is because "the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws." *People v Bragg*, 296 Mich App 433, 451; 824 NW2d 170 (2012) (quotation marks and citations omitted). And, while a prosecutor generally has discretion in determining under which of two possible applicable statutes a prosecution will be brought, that discretion is not unlimited; "where the Legislature carves out such an exception [to the general statute] and provides a lesser penalty for the more specific offense, a prosecutor must charge a defendant under the statute fitting the particular facts." *People v Carter*, 106 Mich App 765, 769; 309 NW2d 33 (1981).

In this case, MCL 168.937 and MCL 168.544c(11) concern the same subject matter. MCL 168.544c(11), provides in relevant part that "[a]n individual shall not . . . (a) [s]ign a petition with a name other than his own [or] (b) [m]ake a false statement in a certificate on a petition." MCL 168.544c(11)(a)-(b). "An individual who violates subsection (11) is guilty of a misdemeanor punishable by a fine of not more than \$500.00 or imprisonment for not more than 93 days, or both." MCL 168.544c(12). Although MCL 168.937 creates the substantive offense of forgery, no provision of the Michigan election law defines the term "forgery" and where a common law offense is undefined in a statute, the common law definition of that offense applies. *Gillis*, 474 Mich at 118. "The common law definition of 'forgery' is a false making . . . of any

written instrument with intent to defraud.” *People v Nasir*, 255 Mich App 38, 42 n 2; 662 NW2d 29 (2003) (quotation marks and citation omitted).

The prosecution contends that the statutes do not conflict because forgery requires proof of intent to defraud whereas MCL 168.544c does not. However, considering the statutory definitions set forth above, proscribe the same conduct—i.e., the falsifying of documents (or signatures thereon) required to be submitted under the Michigan election law. In addition, there can be no doubt that the statutes share a common purpose—to ensure the fairness and purity of the election process and prevent abuse of the elective franchise. Thus, the statutes are “*in pari materia*,” such that they must be “read together as one.” *Buehler*, 477 Mich at 26. Moreover, because MCL 168.937 makes forgery a felony, while MCL 168.544c makes signing someone else’s name on a nominating petition a misdemeanor, the statutes conflict. Therefore, MCL 168.544c, as the more recent and specific statute, controls over MCL 168.937,³ and the prosecution was bound to proceed on misdemeanor charges under MCL 168.544c. *People v LaRose*, 87 Mich App 298, 304; 274 NW2d 45 (1978); *Buehler*, 477 Mich at 26

Our conclusion that MCL 168.544c is controlling is further supported by language contained in MCL 168.544c(18) and MCL 168.937. MCL 168.544c(18) provides that “[t]he provisions of this section *except as otherwise expressly provided apply to all petitions* circulated under authority of the election law” (emphasis added). MCL 168.937 does not expressly provide that it, as opposed to 544(c), governs misconduct involving nominating petitions. In fact, MCL 168.937 contains a qualifying phrase that indicates that 544(c) governs offenses involving nominating petitions. Specifically, MCL 168.937 provides that “[a]ny person found guilty of forgery under the provisions of this act shall, *unless herein otherwise provided*, be punished . . .” (emphasis added). This qualifying provision indicates that, in the event that there is a more specific provision in the election law, the more specific provision applies and MCL 168.937 is not controlling. Here, although MCL 168.937 provides a five-year offense for forgery, MCL 168.544c(11) “otherwise provide[s]” that, in the event that a defendant falsifies a signature on a nominating provision, he or she is guilty of a misdemeanor. In short, language contained in MCL 168.544c(18) and the qualifying provision in MCL 168.937 further indicate that MCL 168.544c is controlling in this case.

Moreover, even if we were to conclude that MCL 168.937 does not conflict with MCL 168.544c, the lower courts did not err in applying the rule of lenity in this case.

“The ‘rule of lenity’ provides that courts should mitigate punishment when punishment in a criminal statute is unclear.” *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). The rule of lenity applies only if the statute is ambiguous or “in absence of any firm indication of legislative intent.” *Id.* at 700 n 12 (quotation marks and citation omitted). An otherwise unambiguous statute may be “rendered ambiguous by its interaction with and its relation to other statutes.” *Id.* at 699 (quotation marks and citation omitted).

³ The parties do not dispute that MCL 168.544c was enacted after MCL 168.937.

In this case, the interaction between MCL 168.937 and MCL 168.544c renders unclear the punishment for falsifying a signature on a nominating petition. As noted, both statutes concern the same subject matter—i.e. falsifying a document required to be submitted under the Michigan election law. However, the statutes impose vastly different punishments. MCL 168.937 imposes a far harsher penalty for the same conduct that is proscribed in MCL 168.544c—a five year felony as opposed to a misdemeanor. In addition, pursuant to requirements set forth in MCL 168.544c(1), all nominating petitions contain a warning immediately following the space on the nominating petition where the circulator is to sign his name, which provides that “[a] circulator knowingly making a false statement in the above certificate, a person not a circulator who signs as a circulator, or a person who signs a name other than his or her own as circulator is guilty of a misdemeanor.” MCL 168.544c(1) (emphasis added). Thus, the penalty for falsifying a signature on a nominating petition is stated to be a misdemeanor. Furthermore, as noted above, MCL 168.544c(18) indicates that MCL 168.544c governs all nominating petitions “except as otherwise provided,” and MCL 168.937 contains a qualifying provision that indicates it yields to other more specific statutes. In short, when these provisions are considered together as a whole, the punishment for falsifying a signature on a nominating petition is unclear, at worst, and at best indicates that the crime is a misdemeanor; therefore, the lower courts did not err in applying the rule of lenity. *Denio*, 454 Mich at 699.

Finally, we agree with the circuit court that charging defendant with 10 felonies as opposed to misdemeanor offenses violates defendant’s due process rights.

Defendant’s due process argument relates to the warnings provided on the nominating petitions, as required by the Michigan election law. MCL 168.544c sets forth very specific requirements regarding the appearance and content of nominating petitions. Relevant to this case, the statute requires that the nominating petitions contain two separate warnings: The first warning, which immediately precedes the space on the nominating petition where voters are to sign their name, provides that “[a] person who knowingly signs more petitions for the same office than there are persons to be elected to the office or signs a name other than his or her own is violating the provisions of the Michigan election law.” MCL 168.544c(1) (emphasis added). The second warning, which immediately follows the space on the nominating petition where the circulator is to sign his name, provides that “[a] circulator knowingly making a false statement in the above certificate, a person not a circulator who signs as a circulator, or a person who signs a name other than his or her own as circulator is guilty of a misdemeanor.” MCL 168.544c(1) (emphasis added). As he did in the lower courts, defendant argues that it would be fundamentally unfair to allow a felony forgery prosecution when the nominating petition itself provides that the conduct at issue in this case is a misdemeanor.

The Fourteenth Amendment to the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law[.]” US Const, Amend XIV. Likewise, the Michigan Constitution provides that “[n]o person shall be . . . deprived of life, liberty or property, without due process of law.” Const 1963, art 1, § 17. Relevant to this case, “[i]n general, due process requires that a person know in advance what questionable behavior is prohibited.” *People v Bruce*, 102 Mich App 573, 577; 302 NW2d 238 (1980) (citations omitted). The United States Supreme Court has additionally held that due process requires notice of more than just what conduct is proscribed, but also of the severity of

the penalty. See *BMW of North America, Inc v Gore*, 517 US 559, 574; 116 S Ct 1589; 134 L Ed 2d 809 (1996) (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty that a state may impose.”); *United States v Batchelder*, 442 US at 114, 123; 99 S Ct 2198; 60 L Ed 2d 755 (1979) (“[V]ague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.”)

At the outset, defendant concedes that the warning provisions contained in MCL 168.544c(1) adequately convey that his conduct—i.e., signing someone else’s name on the nominating petition and making a false statement in the certificate—is illegal. However, United States Supreme Court precedent indicates that it is not enough that a defendant knows his conduct is illegal; he must also be aware of the consequences for that conduct—i.e. the severity of the penalty that a state might impose. *Gore*, 517 US at 574; *Batchelder*, 442 US at 123. Here, the nominating petitions indicated that signing a petition with a name other than one’s own constituted a misdemeanor offense. Defendant signed nominating petitions with names other than his own. On its face, the nominating petitions stated that this conduct constituted a misdemeanor. Notwithstanding, this warning the prosecution sought to charge defendant with 10 felonies. Yet defendant was not on notice that the severity of the penalty for signing another person’s name to a petition was a felony offense. Although the first warning required under MCL 168.544c(1) placed defendant on notice that his conduct violated “the provisions of the Michigan election law,” the second warning indicated that such violation constituted a misdemeanor offense. See MCL 168.544c(1). Furthermore, the plain language of MCL 168.544c(11) and (18) in conjunction with the qualifying provision in MCL 168.937 discussed above, did not place defendant on notice that signing a petition with a name other than one’s own constitutes a five-year felony offense.

In short, because defendant was only on notice that his conduct constituted a misdemeanor, and there was no other warning concerning the severity of the penalty imposed under MCL 168.937, fundamental elements of fairness mandated that defendant be charged under MCL 168.544c(1).

Affirmed. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro

STATE OF MICHIGAN
IN THE SUPREME COURT

* * *

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellant,

-v-

BRANDON MICHAEL HALL,

Defendant/Appellee.

Supreme Court Docket No. 321045

Court of Appeals Docket No. 321045

20th Circuit Court Case No. 13-37857-AR

58th District Court Case No. GH-13-32796-FY

Donald H. Hann (P 14608)
HANN PERSINGER, P.C.
Attorneys for Defendant/Appellee
503 Century Lane, P.O. Box 1559
Holland, Michigan 49422-1559
(616) 396-1245

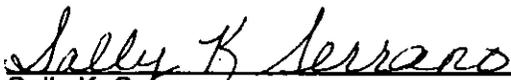
Richard L. Cunningham (P 29735)
ASST. ATTORNEY GENERAL
Attorney for Plaintiff/Appellant
Criminal Division
3030 West Grand Blvd., Suite 10-200
Detroit, Michigan 48202
(313) 456-0180

STATE OF MICHIGAN)
)§
County of Ottawa)

Sally K. Serrano, being first duly sworn, deposes and says that she is employed by the law firm of **HANN PERSINGER, P.C.**, and that on January 15, 2015, she personally mailed by regular, first-class mail, with full postage prepaid thereon, to: Richard L. Cunningham, Assistant Attorney General, 3030 West Grand Blvd., Suit 10-200, Detroit, Michigan 48202, the following documents in the above entitled cause:

1. Defendant/Appellee's Brief in Opposition to Attorney General's Leave to Appeal;
and
2. An Affidavit of Mailing.

Further, deponent says not.



Sally K. Serrano

Subscribed and sworn to before me
on January 15, 2015.



Betty J. Walters, Notary Public
Allegan County, Michigan
My Commission Expires: 11/17/16
Acting in and for Ottawa Co., MI

**HANN
PERSINGER
P.C.**
ATTORNEYS AT LAW

FERNANDO L. BEDEVIA
JENNIFER A. DEYOUNG
ROBERT C. HAMILTON
MARCIA R. MEOLI
RICHARD D. PERSINGER
ROBERT E. SCHREUR

ANNA C. WHITE
DONALD H. HANN
OF COUNSEL

www.hannpersinger.com

MAIL ADDRESS
P.O. Box 1559
HOLLAND, MICHIGAN 49422-1559
PHONE (616) 396-1245

STREET ADDRESS
503 CENTURY LANE
HOLLAND, MICHIGAN 49423
FAX (616) 396-9638

January 15, 2015

Clerk of the Michigan Supreme Court
Michigan Hall of Justice
P.O. Box 30052
Lansing, Michigan 48909

Re: People of the State of Michigan v Brandon Michael Hall
Supreme Court Docket No. 150677
Court of Appeals Docket No. 321045
20th Circuit Court Case No. 13-37857-AR
58th District Court Case No. 13-32796-FY

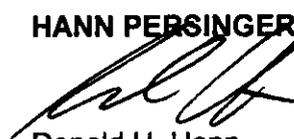
Dear Clerk:

Enclosed herewith for filing in the above captioned cause, please find the original of Defendant/Appellee's Brief in Opposition to Attorney General's Leave to Appeal and seven (7) copies of the same to be submitted to the judges.

Also enclosed is an Affidavit of Mailing verifying the mailing of the same to the Attorney General's Office and I thank you for your assistance on this filing.

Yours very truly,

HANN PERSINGER P.C.



Donald H. Hann
Telephone No. (616) 396-1245/ext 103

DHH:sks
Enclosures
cc: Richard L. Cunningham (w/enc)
Brandon Hall (w/enc)

